Supreme Court, U.S.
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No. 96-1902

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JAMES E. BUTLER, JR.,
Petitioner,
v.
GENERAL MOTORS CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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July 29, 1997

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QUESTION PRESENTED

Did the Court of Appeals act properly when it held an attorney in civil contempt after finding that he had violated the specific commands of its unequivocal order, and required him to compensate the opposing party for the expenses germinating from that misconduct as determined by a District Judge after hearing argument from both parties and after painstaking review of the record and the parties' submissions?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 31, 1996.

Asset Leasing GMbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.1.
Delphi Italia Service Center S.r.1.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance

RULE 29.6 STATEMENT
(continued)

General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

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COUNTERSTATEMENT OF THE CASE

This case grew out of a separate products liability action, *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, 1279-3, 1280-3 (D.S.C.), in which petitioner James E. Butler, Jr., represented plaintiffs who had sued respondent General Motors Corporation ("GM"). The discovery process in *Cameron* was highly contentious. The plaintiffs sought to depose at least twelve current and former GM in-house and outside counsel, and to compel production, among other things, of privileged documents from those attorneys' files. In a series of orders in December 1993, the District Court (G. Ross Anderson, J., D.S.C.) ordered GM to comply with those unprecedented discovery requests. GM immediately filed a petition for mandamus. The Fourth Circuit responded by entering an order staying all proceedings in the District Court pending further review.

In the midst of these discovery disputes, the District Judge in early December 1993 actively participated in a motor vehicle tort conference sponsored by members of the South Carolina plaintiffs' bar. At that conference (which the Judge himself had helped to organize), he repeatedly and publicly denounced motor vehicle tort defendants and was exposed to *ex parte* presentations of evidence and arguments directly relevant to the *Cameron* case by petitioner and other plaintiffs' attorneys involved in that very case. Immediately after the conference, the Judge made hostile remarks to GM's trial counsel and, with no explanation, denied GM time to reply to an important substantive motion.

After carefully studying the transcript of proceedings at the conference and the relevant legal standards, GM filed a recusal motion in January 1994. The Judge not only refused to entertain the motion, but—at a hearing in open court—accused

GM of "scandalizing a federal court" and ordered the company to show cause why its attorneys should not be subjected to Rule 11 sanctions for filing the motion. *See* Tr. of Motions Hearing at 10, *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, *et al.* (D.S.C. Jan. 25, 1994); Order to Show Cause (Jan. 27, 1994).

GM also furnished a copy of its recusal motion to the Fourth Circuit. On February 18, 1994, the Court of Appeals issued an order lifting its stay of the *Cameron* proceedings "solely to allow the district court to hear and rule upon the issue of recusal." *See* Order at 1, *In re General Motors Corp.*, No. 94-1011 (4th Cir. Feb. 18, 1994) (reproduced as Appendix A). The Fourth Circuit noted that "[t]he claims made by [GM] in its motion and accompanying memorandum, if true, are extremely serious." *Id.* at 1. The Court of Appeals ordered that "the district court shall hear and rule upon the issue of recusal" forthwith and "forward to this Court a copy of its order." *Id.* at 1-2.

On February 28, 1994, the District Judge entered an order recusing himself from further participation in the *Cameron* case, and vacating the five pending discovery orders. The Judge, however, did not stop there. Rather, he issued a *59-page order* that made extensive *new* findings of fact and conclusions of law on the specific issues addressed in the discovery orders that his recusal order obliged him to vacate. *See* Order, *Cameron v. General Motors Corp.*, Nos. 6:93-1278-3, *et al.*, 1994 WL 159408 (D.S.C. Feb. 28, 1994) (reproduced as Appendix B).

In light of the inappropriate and highly prejudicial nature of these new findings of fact and conclusions of law, GM promptly filed a motion asking the Fourth Circuit to strike the offending portions of the recusal order. The Fourth Circuit granted the motion. On March 23, 1994, the Court of Appeals issued an Order holding that it was improper for the District

Judge to make new findings of fact and conclusions of law on the issues addressed in the vacated orders. The Order stated in part:

> [S]ection III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by [GM] or [GM]'s counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of [GM]'s counsel with respect to the pending motion for sanctions under Fed. R. Civ. P. 11.

Pet. App. at 101a-102a. In a footnote to this passage, the Court specifically referenced another counsel's citation of the recusal order in a California case as an example of the kind of misconduct that it would not permit. *Id.* at 102a n.1.

Despite the clear terms of this Order, just one week later petitioner cited the stricken findings in a brief filed in a case against GM in federal district court in Kansas, *Cockrum v. General Motors Corp.*, No. 93-1180-MLB (D. Kan.). In particular, petitioner stated that "The Fourth Circuit [in its March 23 Order] did not dispute or otherwise disagree with Judge Anderson's findings . . . in his recusal order" and that Judge Anderson had found "a substantial likelihood that perhaps perjury and the systematic destruction of documents occurred." Pls.' Br. in Opp. to Def. GM's Motion for Protective Order at 14. The brief never stated that Judge Anderson's findings had been stricken by the Fourth Circuit and were not to be cited as authority; rather, the brief asserted that the Fourth Circuit did not consider the evidence relating to those findings, but "simply ruled that such findings had no place within the confines of a recusal order." *Id.*

Several months later, on August 30, 1994, petitioner wrote a letter to the presiding judge in a proceeding against GM in a state court in Georgia, *Moseley v. General Motors Corp.*, No. 90-V-6276 (Sup. Ct., Fulton County, Ga.). Pet. App. at 141a-152a. In that letter, petitioner included a lengthy block quotation from the portion of the recusal order expressly stricken by the Fourth Circuit. *Id.* at 143a-144a. Indeed, petitioner quoted *the very language* that the Fourth Circuit had used in the March 23 Order as an example of the inappropriate findings included in the recusal order. *See id.* Petitioner's letter also stated that "Judge Anderson found many of GM's privilege claims to be baseless, and suggested that Rule 11 sanctions should be investigated based on GM's making of such claims." *Id.* at 150a n.8.[1] The letter omitted any mention of the fact that the Fourth Circuit had stricken the cited portions of Judge Anderson's recusal order and the "findings" relating to the possible Rule 11 liability of GM's trial counsel. To the contrary, petitioner attached to the letter a complete copy of the recusal order.

On September 14, 1994, GM moved in the Fourth Circuit for an order requiring Butler to show cause why he should not be held in contempt for violating the March 23 Order. The Fourth Circuit granted that motion and scheduled a hearing for October 20, 1994. Pet. App. at 103a-104a. At that hearing, counsel for Butler, while not contesting that Butler had cited the stricken language, argued that Butler had not violated the Court's order and that there was no basis for any contempt finding. Pet. App. at 115a.

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[1] In reality, *no other court* has ever agreed with or adopted Butler's allegations about GM's conduct, and *no other court* has ever agreed with or adopted the stricken contentions improperly asserted by Judge Anderson in his recusal order. *See, e.g.*, Alison Frankel, *Debunking the GM Conspiracy Myth*, Am. Law. 87-94 (Nov. 1995) (scrutinizing Butler allegations against GM and finding them to be lacking in proof).

The Fourth Circuit rejected that argument. In August 1995, the court issued its Opinion and Order holding Butler in civil contempt for violating its March 23 Order. Pet. App. at 1a-9a. The Fourth Circuit began by explaining that "[c]ivil contempt is an appropriate sanction if we can point to an order of this Court which 'set[s] forth in specific detail an unequivocal command' which a party has violated." Pet. App. at 5a-6a (quoting *Ferrell v. Pierce*, 785 F.2d 1372, 1378 (7th Cir. 1986)). The court recognized that the complainant bears the burden of proving civil contempt by clear and convincing evidence. *Id.* at 6a (citing *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir.1991)).

Applying these legal standards, the court concluded that "GM has satisfied its burden of demonstrating by clear and convincing evidence that Butler violated the specific and unequivocal commands of our order of March 23, 1994." *Id.* The March 23 Order, the court explained, "was clear and unequivocal." *Id.* "We struck Part III and other portions of Judge Anderson's recusal order as inappropriate, and expressly ordered that the specified portions of the order were not to 'be cited as authority.'" *Id.* (quoting March 23 Order at 2-3). The Fourth Circuit held that by citing and quoting the stricken recusal order in the *Cockrum* brief and the *Moseley* letter, Butler had clearly violated the terms of the March 23 Order. *See id.* at 7a.

The court then turned to the issue of remedy. The court emphasized that "the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive." Pet. App. at 7a (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 302-04 (1947)). A compensatory sanction, the court explained, "may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding." *Id.* (quotations

omitted). The court noted that "[t]here is no question that GM was injured" by Butler's contumacious conduct—the company was forced to "expen[d] considerable resources to correct or thwart the effects of Butler's blatant misconduct." *Id.* at 7a. Accordingly, the court held, "GM is entitled to be compensated for its expenses germinating from [that] misconduct," and "to reasonable costs and attorney's fees for the contempt proceeding before this court." *Id.* at 8a. The court ordered GM to submit a summary of the relevant expenses and costs within twenty days, and ordered Butler to respond no more than ten days later. *Id.* at 8a-9a.

In December 1995, while this contempt proceeding was pending in the Fourth Circuit, the *Cameron* products liability issues were settled; however, Butler continued to litigate three pending cases in which it had been stipulated that the rulings in *Cameron* and each of the other cases would apply to one another. *See* Pet. App. at 5a n.2. In a supplemental brief, Butler argued that the settlement divested the Fourth Circuit of any authority to continue the ongoing contempt proceedings and to grant GM relief for his violation of the March 23 Order. The court rejected that argument. *Id.* at 8a n.3. The pending contempt proceeding, the court explained, was "compensatory in nature, and in contrast to the situation with contempt proceedings that are coercive in nature, 'the termination of the underlying action out of which the contempt hearing arose does not moot the contempt proceeding.'" *Id.* (quoting *Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 400 (5th Cir.1987)). As the court explained, compensatory proceedings differ from coercive proceedings because "the harm or injury that gives rise to the need for compensation continues unredressed at the end of the underlying litigation while the need for getting a party to act in the underlying litigation necessarily terminates when that litigation ends." *Id.* (internal quotation omitted). Because the "harm suffered by

GM—expending considerable resources in other jurisdictions to curb the effect of Butler's blatant misconduct—was unredressed at the time the *Cameron* case was settled," the court held that its compensatory contempt proceeding was not moot. *Id.*

Butler filed an unsuccessful petition for rehearing and rehearing *en banc*. Pet. App. at 135a-136a. Shortly before the expiration of the time to file a petition for certiorari, Butler filed an application for extension of time in which to file such a petition. The Chief Justice denied the application on December 1, 1995, and Butler did not file a petition.

Meanwhile, pursuant to the Fourth Circuit's order, GM filed a summary of costs and expenses in the amount of $212,739.75. GM stated that it was willing to submit more detailed information *in camera* and under seal, inasmuch as that information was protected by the attorney-client privilege and work product doctrine (and would be of particular interest to Butler, who continued to litigate many cases against the company). Butler challenged GM's summary of costs and expenses on both factual and legal grounds, asserting that due process required the company to prove with specificity the fact, amount, and causal nexus of all charges. Absent such proof, Butler argued, the sanction would be unconstitutionally punitive. Accordingly, Butler asked the Fourth Circuit to refer the matter to an appropriate district court for an evidentiary hearing.

By order of September 11, 1995, the Fourth Circuit referred the matter to U.S. District Judge Robert G. Doumar (E.D. Va.) "for review and determination of the proper amount to be assessed against [Butler]." Pet. App. at 138a. That order did not directly address Butler's motion for an evidentiary hearing.

After reviewing an initial round of briefs from the parties, the District Court "decided that each party should be able to hear and respond to the arguments raised by the other," and "therefore ordered the parties to brief the issues according to a briefing schedule set by the Court and, further, to reply to interrogatories developed by the Court to focus on the heart" of the controversy. Pet. App. at 26a. In January 1996, the District Court held oral argument on Butler's motion for an evidentiary hearing. *Id.* at 27a. At that hearing, Butler conceded that the hourly rates charged by GM's outside counsel were reasonable. *Id.* at 27a-28a. The court thereafter ordered GM to submit its bills under seal for Butler's review, *id.* at 28a, and directed Butler to "respond in the form of objections to particular tasks or particular dates, and [to submit] any documentary evidence that Respondent reasonably believe[d could] rebut these charges." Order of March 5, 1996, at 2. Although Butler made numerous general and specific objections, he failed to submit any additional evidence of his own. *Id.* at 28a-29a. In fact, Butler expressly stated that "'[a]ll of the documentary evidence on which Respondent relies herein is already on file with the Court.'" *Id.* at 29a (quoting James E. Butler's Response to GM's 'Tab E' Submission at 2 n.2 (Apr. 1, 1996)). Therefore, the District Court concluded that "evidently the evidentiary hearing requested by Butler was to be without evidence." Pet. App. at 29a. Accordingly, the court denied Butler's request for an evidentiary hearing. Pet. App. at 37a.

The District Court then turned to the task of evaluating in excruciating detail GM's statement of costs and expenses. *Id.* at 37a-98a. The court carried out this task under the appropriate legal standard, emphasizing that GM "certainly bears the burden of proving both the fact and the amount of its losses as well as how Butler's conduct proximately caused those losses." *Id.* at 34a-35a (citing *Buffington v. Baltimore County*, 913 F.2d 113, 135 (4th Cir.1990), *cert. denied*, 499

U.S. 906 (1991)). Ultimately, in an exhaustive 74-page Final Report and Recommendation, the court concluded that GM should recover a total of $190,541.31 in fees and costs incurred as a result of Butler's misconduct. Pet. App. at 99a.

The Fourth Circuit "carefully reviewed" the District Court's painstakingly detailed report and recommendations, as well as Butler's objections thereto and GM's response. *Id.* at 11a. The Court of Appeals commended the District Judge for "wad[ing] through the murky waters of legal billing," and held that there was "no error in his meticulous findings of fact or conclusions of law." *Id.* Accordingly, the Fourth Circuit adopted the District Court's report and recommendation in its entirety. *Id.* at 12a.

REASONS FOR DENYING THE WRIT

THE FOURTH CIRCUIT PROPERLY EXERCISED ITS CIVIL CONTEMPT POWERS.

Petitioner raises several issues masquerading as circuit splits, based chiefly on citations that confuse settled distinctions between civil compensatory contempt proceedings, civil coercive contempt proceedings, and criminal contempt proceedings. In the end, however, this case is simply about an attorney's intentional violations of the specific terms of a court order, which led to the unremarkable result that the Court of Appeals required him to compensate the opposing party for the expenses germinating from the need to respond to his misconduct. The case involves no issues of general interest or importance; to the contrary, the case serves only as a basic and unwelcome reminder that the routine enforcement of judicial orders often leads to unduly contentious and protracted proceedings. This message, as well as the true nature of these proceedings, is conveyed best in the exhaustive report filed by Judge Doumar, *see* Pet. App. at 12a-99a, which the Court of Appeals adopted in its entirety, *see id.* at 10a-12a.

A. The Fourth Circuit Properly Denied Butler's Request for an Evidentiary Hearing Regarding the Amount of the Compensatory Sanction.

Petitioner brazenly asserts that "[t]he Fourth Circuit's denial of an evidentiary hearing in this case was a denial of due process." Pet. at 21. Butler apparently seeks to suggest that the Fourth Circuit held him in contempt without affording him any chance to meet the allegations against him. Any such suggestion is wholly false.

Before holding Butler in contempt, the Fourth Circuit gave him (as well as GM) the opportunity to brief the issues of whether Butler had violated the March 23 Order and, if so, what sanctions were appropriate. The Court then gave Butler (as well as GM) the opportunity to present oral argument on those issues at a hearing in which both parties were represented by counsel. At no time did Butler contend that an evidentiary hearing was necessary to resolve some disputed issue of material fact regarding the underlying events. To the contrary, he did not request an "evidentiary hearing" until *after* the Fourth Circuit had held him in contempt, and then only with respect to the appropriate *amount of compensation* due to GM under the Fourth Circuit's ruling.

After the Fourth Circuit referred the matter to the District Court, the parties were given the opportunity to file additional briefs and to present additional argument. At the same time, Butler insisted that he was constitutionally entitled to an "evidentiary hearing." When asked by the District Court what he hoped to accomplish at such a hearing, however, Butler had no answer. As the District Court noted, Butler conceded that the hourly rates charged by GM's outside counsel were reasonable. Pet. App. at 27a-28a. Even more to the point, Butler conceded that "'[a]ll of the documentary evidence on which [he] relies herein is already on file with the Court.'" *Id.*

at 29a (quoting James E. Butler's Response to GM's 'Tab E' Submission at 2 n.2 (Apr. 1, 1996)).

Because Butler failed to identify any material issue of disputed fact that required resolution at an evidentiary hearing, he had no constitutional right to such a hearing. "Any more evidence would be merely cumulative, and there has been no showing that it would benefit anyone, except for the entertainment of the participating advocates." Pet. App. at 37a.[2] Having given Butler every chance to articulate any conceivable grounds for drawing out the judicial process even further, the District Court finally concluded that "evidently the evidentiary hearing requested by Butler was to be without evidence." Pet. App. at 29a. Under these circumstances, the District Court reasonably concluded that "[t]here is nothing that would be provided by any evidentiary hearing other than for a few hours of bickering." *Id.* at 29a.

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[2] Indeed, the District Court's exasperation with Butler on this score was palpable:

> The Court has afforded [Butler] numerous opportunities to state exactly why an evidentiary hearing is necessary; not in the abstract, amorphous principles of due process, but rather precisely what witnesses Butler believes he would need to call or what evidence would need to be produced. He has identified not a single individual whose live testimony would aid the Court's decisional process. The Court also afforded [Butler] every opportunity to put forth documentation and other written evidence which would rebut GM's claims. He has put forth a few affidavits, which have been discussed above, and identified certain documents in response to the Court's interrogatory. . . . Once the sun burns through the fog of [Butler's] persistent arguments supporting his demand for an evidentiary hearing, we are left with only one conclusion: "there is no there there."

Pet. App. at 35a-36a (quoting Gertrude Stein, *Everybody's Autobiography* 289 (1937)).

Butler's assertion that this case implicates a "conflict among the circuits" on the need for an evidentiary hearing in contempt proceedings, Pet. at 18, is thus fanciful. It is axiomatic that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar,* 117 S. Ct. 1807, 1812 (1997). The extent to which due process requires an evidentiary hearing in a contempt proceeding depends on the nature of the proceeding and the issues in dispute. Summary judgment motions are granted all the time against parties who are unable to identify any genuine issue of material fact in particular cases. Accordingly, there is no inconsistency between this case and those cases that Butler identifies as having "recognized th[e] right to an evidentiary hearing in broad terms." Pet. at 19. None of those cases holds that an alleged contemnor is entitled to burden the court with an unnecessary evidentiary hearing even where, as here, he could not articulate any genuine issue of material fact that is legitimately in dispute.

B. The Contempt Sanction Imposed Here Is Civil, Not Criminal, in Nature.

One of Butler's principal contentions is that the contempt sanction imposed below is inherently criminal, rather than civil, in nature, and that the Fourth Circuit violated his due process rights by failing to afford him the procedural protections of the criminal law. Pet. at 21-24. The argument is premised on Butler's assertion that the Fourth Circuit's sanction is punitive rather than compensatory. That assertion is frivolous.

The Fourth Circuit was keenly aware of the distinction between civil and criminal contempt, and took pains to emphasize that the sanction imposed here was compensatory rather than punitive in nature. Pet. App. at 7a. The District Court, in calculating the appropriate amount of the sanction, emphasized the same point. *Id.* at 33a-35a. The fine imposed, accordingly, was carefully limited to the sums that GM was

forced to expend to remedy Butler's violation of the March 23 Order, both in the *Moseley* and *Cockrum* cases and in the Fourth Circuit itself. The District Court required GM to establish with specificity not only the fact and amount of its expenditures, but also the causal nexus between those expenditures and Butler's misconduct. *Id.* at 34a-35a. The resulting fine was to be paid to GM, not to the court. Under these circumstances, the sanction was clearly compensatory (and hence civil) in nature. "If the relief provided is a fine, *it is remedial when it is paid to the complainant*, and punitive when it is paid to the court." *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 (1988) (emphasis added).

In any event, the issue involves at most the application of settled law to the facts of this case. Butler cannot (and does not) contend that the Fourth Circuit erred as a matter of law in describing the differences between civil and criminal contempt. To the contrary, that court emphasized that "the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive." Pet. App. at 7a (citing *United States v. United Mine Workers of Am.*, 330 U.S. 258, 302-04 (1947)). Butler simply challenges the findings below regarding the *extent* of the "compensable loss" suffered by GM as a result of Butler's misconduct under the specific facts of this case. Needless to say, that factbound determination does not warrant this Court's review.

C. The Fourth Circuit's March 23 Order Was Not Ambiguous.

Butler also argues that *no* contempt sanction, whether civil or criminal, is appropriate here on the ground that the Fourth Circuit's March 23 Order was insufficiently clear and specific to provide an "unmistakable command." Pet. at 16-18. According to Butler, the Fourth Circuit's statement that the recusal order was stricken and "should not hereafter be cited as authority" was merely "precatory," Pet. at 17, and did not

provide him with "fair notice" that he was barred from citing the order, *id.*

Merely to restate this argument is to refute it. Any person of ordinary intelligence, and certainly an officer of the Court, should have no difficulty understanding the meaning of the March 23 Order. Whatever the meaning of the word "should" in other contexts, in this context its meaning was crystal clear: Butler was forbidden to cite the stricken passages of the recusal order. Indeed, the court stressed precisely the conduct that was proscribed by citing as an example of forbidden conduct the use that another attorney had made of the stricken recusal order in citing it before another tribunal. *See* Pet. App. at 102a n.1. If Butler had any question about the meaning of the court's command, moreover, he was free to ask the Fourth Circuit for clarification. He did nothing of the sort. His current attempt to discern ambiguity in the March 23 Order is nothing but belated sophistry.

In any event, Butler's challenge to the specificity of the March 23 Order at most raises a factbound challenge to the Fourth Circuit's application of settled law. Butler cannot (and does not) contend that the Fourth Circuit erred as a matter of law in describing the legal standards governing the specificity required for contempt sanctions. To the contrary, the Fourth Circuit emphasized that contempt sanctions are appropriate only where "the putative contemnor has violated an order that is clear and unambiguous." Pet. App. at 6a (quoting *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir.1991)). Butler quarrels only with the application of that established standard to the specific facts of this case.

Needless to say, the "circuit conflict" Butler alleges is wholly illusory. The two cases on which he relies, *see* Pet. at 17 (citing *United States v. Robinson*, 922 F.2d 1531, 1534 (11th Cir. 1991), and *In re Baum*, 606 F.2d 592, 593 (5th Cir. 1979)), both were *criminal* contempt proceedings that involved

wholly different facts: (1) *Robinson*, involved the alleged violation of a "precatory" and non-binding court rule of which an attorney was deemed not to be on notice, 922 F.2d at 1534; and (2) *Baum* involved the alleged violation of a court order of uncertain scope that had vacated a notice of deposition, 606 F.2d at 593. In contrast, the order at issue in this case gave rise only to compensatory civil contempt proceedings, and it clearly put Butler on notice that he should not cite the stricken portions of the recusal order—which, of course, he promptly proceeded to do on two separate occasions in a calculated effort to procure an undeserved advantage before other courts in separate litigation against GM.

D. The Settlement of the Underlying Litigation Did Not Divest the Fourth Circuit of Authority to Enforce Its March 23 Order.

Butler also argues that the settlement of the underlying *Cameron* action divested the Fourth Circuit of authority to enforce its March 23 Order. Indeed, he asserts this case implicates "a clear conflict among the lower courts" on the question whether a court may impose a civil contempt sanction after the termination of an underlying action. Pet. at 24. Again, his erroneous claim rests on the self-serving conflation of different categories of contempt proceedings.

The settlement of the *Cameron* case did not wipe the Fourth Circuit's March 23 Order off the books. That settlement neither *purported to* nor *could* accomplish anything of the kind, since private parties have no authority to alter legal obligations imposed by a court. *Cf. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26-27 (1994). The March 23 Order thus remains binding law to this day, and will continue to remain binding law unless and until it is vacated by the

Fourth Circuit or by this Court.[3] The ongoing vitality of the Fourth Circuit's Order, in other words, is not contingent on the ongoing vitality of the *Cameron* case. Indeed, the March 23 Order was entered in a *mandamus* proceeding that is distinct from, and collateral to, the underlying case.

In addition, the Fourth Circuit emphasized that the civil contempt sanction here was *compensatory* rather than *coercive* in nature. *See* Pet. App. at 8a n.3. This Court has upheld judicial authority to resolve pending sanctions disputes by awarding compensatory relief even after the termination of an underlying action. *See, e.g., Willy v. Coastal Corp.*, 503 U.S. 131, 137-39 (1992); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-96 (1990). A court's power to award coercive relief, in contrast, necessarily ends along with the litigation in which such relief is sought—because after the litigation is over, "there [is] nothing to coerce [the alleged contemnor] to do." *Martin v. Guillot*, 875 F.2d 839, 845 (11th Cir. 1989); *see also United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (authority to impose coercive civil contempt order necessarily falls with jurisdiction over case). Butler attempts to gloss over the critical distinction between compensatory and coercive civil contempt, broadly asserting that "the disposition of an underlying action terminates the judicial power to impose *a civil contempt sanction* in connection with that action." Pet. at 24 (emphasis added). This assertion is overbroad and consequently incorrect.

Butler also asserts that the decision below conflicts with decisions from other circuits holding that "'there is no such thing as an independent cause of action for civil contempt.'" Pet. at 25 (quoting *D. Patrick, Inc. v. Ford Motor Co.*, 8 F.3d

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[3] In addition, of course, it would have been unethical for Butler even to have attempted to resolve the pending contempt proceeding against *him* as part of the settlement he negotiated for his clients in the *Cameron* case.

455, 459 (7th Cir. 1993)). That assertion, too, is mistaken. This case does not implicate any such conflict for the simple reason that this case does not involve an "independent cause of action" for civil contempt. As noted above, the Fourth Circuit's March 23 Order was binding law at the time that Butler violated it, and remains binding law to this day. After GM learned of Butler's violations of that Order, GM did not seek to file a new cause of action; instead, it returned to the Fourth Circuit and asked that court to hold Butler in contempt. A request for a court to enforce an order of ongoing vitality, needless to say, is not the same thing as initiating an "independent cause of action" for civil contempt. GM's petition for relief in the Fourth Circuit thus bore the same caption and the same docket number as the mandamus petition in which the March 23 Order was entered.

In all of the cases on which Butler relies, in contrast, the question was whether a litigant could file a separate and distinct cause of action for contempt. *See* Pet. at 25 (citing *D. Patrick*, 8 F.3d at 459; *Finn v. Schiller*, 72 F.3d 1182, 1188 (4th Cir. 1996); and *Blalock v. United States*, 844 F.2d 1546, 1550 (11th Cir. 1988) (*per curiam*)). None of those cases remotely held that a party could not invoke the judicial contempt powers to enforce an order of ongoing vitality. Indeed, that is the only proper way to obtain legal relief against a party who violates judicial orders. Moreover, the fact that one of the cited cases is from none other than the Fourth Circuit only underscores that this case does not implicate the circuit split alleged by Butler.

E. The Fourth Circuit Did Not Deny Butler Dispassionate Review.

Finally, Butler asserts that the Fourth Circuit "yielded to passion and put aside its better judgment," Pet. at 15, and that intervention by this Court is necessary to provide "dispassionate" review, *id.* at 14. That argument is baseless

and, to say the least, ironic.

Far from "yield[ing] to passion," the Fourth Circuit conducted these proceedings in a most restrained and temperate manner. The court carefully chronicled the facts underlying its judgment of contempt—indeed, Butler does not even allege any factual error underlying that judgment. The court then referred the matter to a district court to calculate the appropriate amount of the compensatory sanction. The District Court proceeded to make "meticulous" findings of fact and conclusions of law in an exhaustive 74-page Report and Recommendation. The Fourth Circuit adopted the District Court's findings in their entirety—and those findings, again, now stand unchallenged. Needless to say, Butler's request for "dispassionate" review by this Court rings hollow when he cannot identify any way in which the decision below is actually tainted by unwarranted "passion." Butler's characterization of the modest compensatory sanction imposed below as "manifestly unjust," Pet. at 14, speaks volumes about his peculiar view of "justice."

In any event, it is especially inappropriate at this late date for Butler to seek this Court's review of the contempt judgment entered by the Fourth Circuit almost two years ago. Butler could have sought such review back in 1995, but failed to do so. His failure to file a timely petition for certiorari, after the Chief Justice denied a last-minute request for an extension of time, strongly undercuts his current claim of victimization by the Fourth Circuit. Over the past two years, the judicial system has devoted inordinate time and resources to assessing the appropriate amount of the contempt sanction against Butler. Throughout that period, the *fact* of Butler's contempt itself has never been in doubt. Thus, while Butler is correct that this Court has the *power* to review the underlying judgment of contempt at this time, *see* Pet. at 2 n.1, he fails to identify any reason why the Court should exercise its *discretion* to grant his

petition for review in the unattractive circumstances of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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